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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 338.

DAVID H. JENNINGS, Receiver of the National Bank of America, and NATIONAL BANK OF AMERICA, *Petitioners,*

vs.

UNITED STATES FIDELITY AND GUARANTY COMPANY, *Respondent.*

BRIEF OF THE COMPTROLLER OF THE CURRENCY AS AMICUS CURIAE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Comes now J. F. T. O'Connor, Comptroller of the Currency of the United States, and respectfully submits his brief, as amicus curiae, in support of the petition for writ of certiorari filed by David H. Jennings, Receiver of the National Bank of America of Gary, Indiana, in the above entitled cause.

I.

FOREWORD.

Citation of the opinions below, statement concerning the jurisdiction of the court to issue writ of certiorari, summary of the facts, specification of errors, and argument of the is-

sues involved, have been summarized in the petition for writ of certiorari and supporting brief filed by the Receiver of the National Bank of America, Gary, Indiana, and therefore reference is here made to the same in the interest of avoiding repetition.

II.

INTEREST OF THE COMPTROLLER OF THE CURRENCY IN THE CASE FROM AN ADMINISTRATIVE STANDPOINT.

The Comptroller of the Currency is now engaged in liquidating 1547 insolvent National banks,—the largest number in the history of the National Banking Act,—for the purpose of making ratable distribution to approximately three and one-half million depositors and other creditors owning claims against said banks at suspension amounting approximately to one billion eight hundred and fifty million dollars. Before disbursement can be made it is required that the claims, whether general or preferred, be established to the satisfaction of the Comptroller, or in a court of competent jurisdiction. (Sections 5234, 5235, 5236 U. S. R. S.; U. S. C., Ch. 2, Title 12, Sections 192, 193, 194.)

Thousands of preferred claims have been asserted before the Comptroller incident to the liquidation of these banks. Such preferred claims are allowed by the Comptroller where it affirmatively appears, as required by the rule settled by weight of authority in the Federal courts, that the bank received an identifiable res in trust for the claimant and the proceeds are traceable into the hands of the bank Receiver. *Larabee Flour Mills v. First National Bank* (C. C. A. 8), 13 Fed. (2nd) 330-331, certiorari denied 273 U. S. 727; *City of Miami v. First National Bank* (C. C. A. 5), 69 Fed. (2nd) 346, 349; *Allied Mills v. Horton*, 65 Fed. (2nd) 708; *Board of Commissioners v. Strawn* (C. C. A. 6), 157 Fed. 49, 54. The Comptroller's disallowance of such claims, where found invalid, has resulted in the filing of many ac-

tions now pending in the United States District Courts and Circuit Courts of Appeal. To quote the opening sentence from the recent opinion of the Circuit Court of Appeals for the Fifth Circuit in *Wisdom v. Keen*, 69 Fed. (2nd) 349:

> "This is another of the multiplying cases in which the ratable distribution to all creditors of the assets of a failed National bank under 12 U. S. C. A., Sec. 194, is sought to be disturbed by the assertion of a lien upon them because of a commingled trust fund."

While there have been hundreds of decisions of United States District Courts and Circuit Courts of Appeal, disposing of such claims, we find only one case of preferred claim against a national bank in receivership that has been reviewed on the merits by this court, that of *Blakey v. Brinson*, 286 U. S. 254. This Court's decision in the Blakey case turned on the trust relationship question exclusively, and consequently this Court has never directly passed upon the tracing of funds feature of these claims against insolvent National banks, which factor is controlling in most instances.

The instant case turns upon the tracing of funds feature and involves the factual situation common to this type of cases. The now closed bank received a check in the amount of $2196.89 for collection and remittance and effected collection in the customary way through a clearing house transaction which resulted in a debit balance against it. Such a transaction neither augmented the now closed bank's assets nor permitted tracing to the Receiver, within the purview of the requirements established by the Circuit Court of Appeals, Eighth Circuit, in *Farmers National Bank v. Pribble*, 15 Fed. (2nd) 175, and the many other Federal cases some of which are cited page 2, *supra*. The Court below undertakes to avoid this rule, apparently by a finding that an Indiana statute, the Uniform Bank Collection Code, imputes augmentation and tracing, despite the record to the contrary, and also by a finding that the bank's

cash that passed to the Receiver was greater by the sum of $2196.89 because of the use of the claimant's item in the clearings, in lieu of the bank's cash, which is in conflict with the following rule of the Pribble case quoted from page 176 of the opinion:

> "The fact that the claimant's property paid or reduced the indebtedness or liability of the insolvent corporation so that it will pay a larger percentage of its debts justifies no lien on its assets by or preference in payment to the cestui que trust."

The court below thus holds that the funds in the hands of the bank Receiver belonging to depositors, whose equities, we submit, are at least equal to those of the claimant, shall respond *in full* for the trust claim of $2196.89, despite record proof that not one penny of such funds actually came into the bank from the claimant's transaction.

As the result of this decision, a claim of this character,—and there are many such claims,—has a preferred status against an insolvent National bank located in the Seventh Circuit, but has a general claim status only, in the other Circuits, contrary, we submit, to the intent of the National Banking Act which contemplates a plan of liquidation that will be uniform throughout the 48 States. Cook County National Bank v. United States, 107 U. S. 445, 448; *First National Bank v. Selden*, 120 Fed. 212, 215. The decision in the instant case appears to be in *direct conflict* with the principles of law heretofore applied in the Circuits other than the Seventh, and with the principles applied and stated by this Court in *Schuyler v. Littlefield*, 232 U. S. 707, 713, and *Pottorff v. Texas & Pacific Railroad Co.*, 291 U. S. 245, 261, Note 19. The instant case is the first decision of an Appellate Federal Court holding that a State statute [illegible]he Uniform Bank Collection Code), can increase or affect in any way the rights of a trust claimant against an insolvent National bank, and it appears to be contrary in principle to the decisions of this court in *Davis v. Elmira Savings*

Bank, 161 U. S. 275, 287; *Easton v. Iowa*, 188 U. S. 220, 231, and *Cook County National Bank v. United States*, 107 U. S. 445, 448. The Uniform Bank Collection Code has been adopted in 18 States, including New York, Pennsylvania, Illinois, Indiana, Michigan and New Jersey; consequently this phase of the decision of the court below is of class importance in the winding up of National banks, and to banking and business interests generally.

Every effort is being made by the appropriate Federal agencies to give speedy relief to the depositors and creditors of insolvent National banks. A decision by this court settling the tracing of funds issues of law involved in the instant case and the companion case of *Adams v. Champion*, now pending in this court on petition for writ of certiorari, No. this term,—regardless of whether the decisions below be affirmed or reversed,—will be of inestimable aid to the Comptroller in disposing of the large number of similar pending claims and will unquestionably substantially expedite the liquidation of National banks in Receivership by making possible the disposition of numerous other actions pending in the Federal courts involving the same issues, and by eliminating future litigation of the same type.

III.

CONCLUSION.

The Comptroller of the Currency therefore earnestly urges this Honorable Court to entertain the petition for write of certiorari filed by the Receiver in the instant case.

Respectfully submitted,

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